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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. ~~1766.~~ 1158

RICHARD McLISH, PLAINTIFF IN ERROR,

vs.

A. B. ROFF AND W. R. WATKINS.

IN ERROR TO THE UNITED STATES COURT FOR THE INDIAN TERRITORY.

FILED MAY 11, 1891.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MAY 14, 1891.

1 Be it remembered that at a term of the United States court for the Indian Territory, third judicial division, begun and holden, at the town of Ardmore, on the third day of March, A. D. 1891—present and presiding, the Hon. James M. Shackelford, judge of said court—and which term adjourned on the fifteenth day of April, A. D. 1891, the following cause came on for trial, to wit:

In the United States Court for the 3rd Division, Indian Territory.

A. B. ROFF & W. R. WATKINS, Pl'ffs,
vs.
RICHARD MCLISH, Def't. } 1st Amended Original Complaint.

And now come the plaintiffs, A. B. Roff and W. R. Watkins, and, after leave of the court first obtained, file this their first amended original complaint in lieu of and as a complete amendment to their original complaint filed herein August 15th, 1890, and make the same read as follows:

1st. The plaintiffs allege and show to the court that the defendant, Richard McLish, is a member of the tribe of Chickasaw Indians by blood, and that both the plaintiffs, A. B. Roff and W. R. Watkins, were born in the United States of America and are now and have always been citizens of the United States of America;

2 that said Roff and Watkins are both members and citizens of the Chickasaw tribe of Indians by intermarriage, and that they nor neither of them are citizens or members of the Chickasaw or Choctaw tribes of Indians by nativity or adoption; that the plaintiffs nor neither of them have ever renounced their allegiance to the Government of the United States of America, and that they nor neither of them have ever taken the — of allegiance to the government known as the Chickasaw government. The plaintiff W. R. Watkins alleges and shows to the court that on or about the 15th day of November, 1865, he was legally married to Elizabeth Tyson, a member of the tribe of Chickasaw Indians by blood, and as such member of said tribe of Chickasaw Indians said Elizabeth Tyson was entitled to all the rights, immunities, and privileges guaranteed unto the members and citizens of said tribe of Indians by the constitution and laws of the said Chickasaw Nation, by the treaties of said Indians with the United States, and by the Constitution and laws of the United States.

The plaintiff A. B. Roff alleges that about the year 1856 the Legislature of the Chickasaw Nation passed an act adopting

3 as citizens of said Chickasaw Nation the heirs of Wm. Bourland, to wit, Amanda Gordenchite and Beur Hanna Bourland, and that on the 7th day of Oct., 1876, said Legislature passed another and different act affirming and adopting said act passed about the year 1856 aforesaid; that during the year 1867 this plaintiff, A. B. Roff, was duly and legally married to said Matilda Bourland, a daughter and heir-at-law of said Wm. Bourland, and that they continued to live together as husband and wife until his said wife died, to wit, on the first day of March, 1869; and this plaintiff,

A. B. Roff, alleges that during the year 1856, by reason and virtue of said act by the Chickasaw Legislature, the said Matilda Bourland became and was a member of the tribe of Chickasaw Indians by adoption, and that by reason of said Roff's intermarriage with said Matilda Bourland, to wit, about the year 1867, he, the said plaintiff, A. B. Roff, became and was a citizen and member of the Chickasaw tribe of Indians by intermarriage; and this plaintiff alleges that by reason of the passage of said act of the Chickasaw Legislature in the year 1856 adopting the heirs of the said Wm. Bourland as citizens and members of the tribe of Chickasaw Indians, as aforesaid, and the subsequent act passed by said Legislature, to wit, October 7th, 1876, confirming and approving said act last aforesaid, and by reason of said intermarriage with said Matilda Bourland as aforesaid, this plaintiff, A. B. Roff, by intermarriage acquired the vested and irrevocable rights of a citizen or member of the Chickasaw tribe of Indians, as guaranteed by the constitution and laws of the government of the Chickasaw Indians, by the Constitution and laws of the United States, and the treaties made by said tribe of Indians with the United States, and that ever since his intermarriage with said Matilda Bourland, in the year 1867, this plaintiff, Roff, has resided in said Chickasaw Nation, claiming and exercising the rights of a citizen of said Indian tribe; but this plaintiff, Roff, alleges and shows to the court that said Chickasaw Legislature, without authority of law and contrary to and in violation of the Constitution and laws of the United States of America, and contrary to and in violation of the constitution of said Chickasaw government, and contrary to and in violation of the treaties then existing between said tribe of Chickasaw Indians and the United States Government, on, to wit, the 13th day of October, 1883, passed an act purporting to repeal said acts of said Legislature adopting as citizens and members of said tribe of Indians the heirs of said William Bourland, hereinbefore mentioned.

4

5

And this plaintiff, A. B. Roff, alleges and shows to the court that since the passage of said last-named act by said Chickasaw Legislature as aforesaid that the Chickasaw government, its courts and officers, have ignored and wholly repudiated this plaintiff's citizenship acquired at the time and in the manner aforesaid; and this plaintiff further alleges that the courts of said Chickasaw Nation have refused to entertain jurisdiction or take cognizance of any controversy between himself and citizens of said Chickasaw Nation, but have and do yet refuse to protect him in his property rights as such citizen or member of said tribe of Chickasaw Indians.

2nd. The plaintiffs, A. R. Roff and W. R. Watkins, allege that on or about the 1st day of September, 1888, they, as citizens and members of said tribe of Chickasaw Indians as aforesaid, had the right to own, and did own, as tenants in common, each plaintiff owning an undiv-ed one-half interest therein, what is known as a claim in said Chickasaw Nation; that said claim consisted in the right to occupy, to the exclusion of all persons for an indefinite term of years, and so long as the members of said tribe of Chickasaw In

dians shall continue to own their lands in common, the tract of land hereinafter described; that on said last-named day and date these
6 plaintiffs were in the actual and peac-able possession of said tract of land, but they allege that on said day and date the said defendant, Richard McLish, unlawfully entered upon said premises and unlawfully ousted these plaintiffs therefrom, and that defendant unlawfully withholds and continuously since said last-named date has wrongfully and unlawfully withholds said premises from these plaintiffs to their great damage—ten thousand dollars; that said tract or parcel of land is described as follows: Situated in Pickens county, Chickasaw Nation, Indian Territory, beginning at the point on the Gulf, Colorado and Santa Fé railroad where Broadway street, in the town of Ardmore, crosses said railroad, thence east about one mile to a stake, the northeast corner of said A. B. Roff's pasture fence; thence south about one mile to a stake, the southeast corner of said Roff's pasture fence; thence west (crossing said Gulf, Colorado & Santa Fé railroad just north of the Douglass place, south of Ardmore), about one and one-fourth miles; thence north to said Broadway street, in said town of Ardmore; thence east, parallel with said Broadway street, to the place of beginning.

The plaintiffs allege that their said claim to the possession of said tract of land embraces and includes the right of plaintiffs to manage and control said tract of land, to rent the same to any person or persons for the period of one year in such quantities and parcels as they
7 may desire to divide the same into, to put thereon and own all improvements that they might make thereon, together with the right to sell said improvements to any and all persons, and the right to sell plaintiffs' right to possess and occupy said land to any member or citizen of the tribe of Chickasaw or Choctaw Indians.

3rd. The plaintiffs allege that a large portion of said tract of land has been divided and subdivided into smaller tracts, lots, and parcels, which smaller tracts, lots, and parcels are now embraced and included in the territory known as the town of Ardmore, Chickasaw Nation, Indian Territory; that there are about five hundred lots in said town of Ardmore situated upon said tract of land, as aforesaid; that the reasonable value of the rents of said lands, the right of possession, use, hire, and other revenues of the same from said first day of September, 1888, to the time of filing this complaint is about ten thousand dollars; and these plaintiffs allege that said defendant has wrongfully and unlawfully occupied said land, collected rents for the use and occupation of said lands and said subdivisions aforesaid since said first day of September, 1888, from divers and sundry persons to about the sum of ten thousand dollars, and has wrongfully and unlawfully converted the same to his own use and benefit, whereby these plaintiffs have been damaged in the sum of ten thousand dollars.

4th. The plaintiff W. R. Watkins alleges that prior to filing this suit he and those under whom he claims in good faith made per-

manent and valuable improvements upon said tract of lands as follows:

8	Erecting one log house with three rooms, at a cost of	$150 00
	Digging one well, at a cost of	50 00
	Fencing three lots and 3½ acres in truck patch with pickett fence	100 00
	Building one log house, smoke-house, and corn crib, at a cost of	75 00
	Fencing and breaking and putting in a state of cultivation 150 acres of land, at a cost of	700 00
	Material for and building one residence, at a cost of	1,000 00
	Digging one well, at a cost of	30 00
	Fencing two lots, at a cost of $10.00 each	20 00
	Material for & building smoke-house, at a cost of	50 00
	Material for & building brick walks, paling fence, &c., at residence	25 00
	Total value of improvements	$2,200 00

5th. The plaintiff A. B. Roff alleges that he and those under whom he claims, and prior to the filing of this suit, in good faith made the following permanent and valuable improvements upon said land, to wit:

	Material for and the building of four miles of pasture fence, rails, and wire, at cost of	$300 00
	Material for & building of dwelling-house and smoke-house, digging well, &c., at cost of	1,800 00
	Material for and the building of one tenement house, at a cost of	350 00
	Material for & the building of one tenement house, at a cost of	250 00
	Material for & the building of one tenement house, at a cost of	175 00
	Total value of improvements	$2,875 00

6th. Wherefore, the premises considered, the plaintiffs pray that the defendant be cited to answer this complaint, and that upon final hearing they have judgement for the restitution of said premises, for their said rents, and damages and costs of suit; and, in the event the court holds that the plaintiffs are not entitled to recover said premises, that they recover against the defendant the value of the improvements put upon said premises as aforesaid and costs of suit.

HERBERT & LEDBETTER,
POTTER, POTTER & MATHIS, &
MITCHELL & ROBERTSON.
Att'ys for Pl'ffs.

9 CHICKASAW NATION, }
Indian Territory. }

I, W. R. Watkins, one of the plaintiffs in the foregoing complaint, say upon oath that the allegations therein contained are true.

W. R. WATKINS.

Subscribed and sworn to before me this the 13th day of March, 1891.

A. D. MATTHEWS,
U. S. Commissioner.

The foregoing has the following endorsement, to wit: No. 38. A. B. Roff and W. R. Watkins *vs.* Richard McLish. 1st amended original complaint. Filed —— —, 1891. Wm. Nelson, clerk.

In the United States Court for the Indian Territory, Third Division.
March Term, 1891.

A. B. ROFF and W. R. WATKINS *vs.* RICHARD MCLISH. } No. 38. Amended Demurrer and Answer.

Now comes the defendant, Richard McLish, and by leave of the court amends his plea to the jurisdiction of this court, filed at its October term, 1890, and his demurrer to the jurisdiction of the court and his answer filed March 13th, 1891, so as to read as follows, to wit:

First.

It appears from plaintiffs' amended complaint that the parties plaintiff and defendant are citizens of the Chickasaw Nation or tribe of Indians, and that the court is without jurisdiction over the parties to this suit, and of this the defendant prays the judgement of the court whether he ought to answer said complaint.

10 Second.

It appears from said amended complaint that plaintiffs acquired their pretended rights as citizens of the Chickasaw Nation, and that they claim such rights because of their said citizenship, and that this is a controversy between citizens of the Chickasaw tribe of Indians, of which the courts of said tribe have exclusive jurisdiction, and of this the defendant prays a judgement of the court that this suit be dismissed.

DAVIS & HARRIS &
JOHNSON & CRUCE,
Att'ys for Def't.

Third.

And should the above demurrer be overruled, and should this court hold that it has jurisdiction of this cause, the defendant, under protest and without waiving his said pleas or demurrers to the jurisdiction of this court, in answer to said amended complaint says—

That it is not true, as alleged in said amended complaint, that the plaintiffs or either of them ever owned or possessed the premises in controversy or had any right thereto, possessory or otherwise, and it is not true, as alleged in said amended complaint, that the authorities of the Chickasaw Nation have ever refused to protect the plaintiffs or either of them in their property rights, if any, but that the plaintiffs claimed to be citizens of the said Chickasaw Nation for the purpose of acquiring property therein, but citizens of the United States for the purpose of suing for the same.

11 That the plaintiffs were not in the peac-able possession of said property on the first day of September, 1888, or at any other time, and that the only possession that the plaintiffs ever had to any portion of same was by wrongful intrusion upon the prior right and possession of the defendant, and that the plaintiffs do not have and never did have any right to said premises and never in any manner complied with the laws of the Chickasaw Nation concerning claims to land, but that if either of the plaintiffs ever had any rights to said premises, possessory or otherwise, the same *was* lost and abandoned long prior to the institution of this suit, and that each of the plaintiffs claims and possesses in said nation other and different premises than the lands in controversy and to a greater extent than is permitted under the laws of said nation; and defendant denies that the plaintiffs ever placed any improvements upon said premises of the value and amount alleged in said complaint, but if they ever made any improvements upon said premises the same were made with full knowledge of the defendant's rights therein and while they were knowingly trespassing upon defendant's prior possession; and the defendant denies that the premises in controversy are of annual value of the sum of ten thousand dollars or of any such large sum; and the defendant says that he and those whose estate he has settled upon *and* improved the lands in controversy when the same were a part of the unoccupied and unappropriated lands of the

12 Chickasaw Nation, and still so occupy and possess said lands, and in all things have complied with the laws, usages, and customs of said Chickasaw Nation.

Second.

And the defendant further alleges that heretofore, to wit, on the 24th day of May, 1889, while the defendant was a citizen of the Chickasaw tribe of Indians by nativity and the plaintiff W. R. Watkins was a citizen of said tribe of Indians by marriage, and while the defendant and said Watkins were each a resident of said tribe, the defendant in due form filed his written petition in the tribal court for said nation, known as the district court for Pickens county, claiming and

alleging in said petition that this defendant was the owner of the premises in controversy, and that said W. R. Watkins was intruding thereon and wrongfully asserting claim thereto, of which controversy said district court had jurisdiction, and that the said Watkins was duly cited to appear and answer to said petition, and in obedience to said process the said Watkins did appear before said district court and submitted himself to the jurisdiction thereof and answered to the merits in said suit; and afterwards, on the 30th day of May, 1890, said — came on for trial before said district court, before the Hon. Humphrey Colbert, special district judge, and thereupon this defendant and the said W. R. Watkins appeared and a trial was had before said court and a jury upon the merits of said controversy, and thereupon a verdict and judgment were rendered in favor of this defendant and against the said Watkins, ad-
13 judging and establishing this defendant to be the owner of the premises in controversy and awarding him a writ of possession, which judgment is still in full force and effect and has never been appealed from or annulled, and that in said cause the said Watkins possessed and relied upon the same rights that he now possesses and this defendant owned and asserted the same title which he now owns, and that the matters in controversy and issues in said cause were the same as are now involved in this suit, and by said judgment said Watkins is estopped from claiming the said lands now in controversy; and, having fully answered, the defendant prays that he be discharged with his costs.

DAVIS & HARRIS,
JOHNSON & CRUCE,
Attys' for Def't.

I, Richard McLish, the defendant, upon oath say that I believe the allegations in the foregoing answer are true.

RICHARD McLISH.

Sworn to and subscribed before me this the 14th day of March, 1891.

A. D. MATTHEWS,
[SEAL.] *Notary Public.*

The foregoing has the following endorsement, to wit: No. 38. A. B. Roff and W. R. Watkins *vs.* Richard McLish. Amended demurrer and answer. Filed in open court this 14th day of March, 1891. Wm. Nelson, clerk, by A. D. Matthews, deputy. Davis & Harris & Johnson & Cruce, att'y- for def't.

14 A. B. ROFF *et al.* } 38.
vs.
RICH'D MCLISH.

This day came the parties, and then came on to be heard the demurrer of the defendant, contained in his answer filed March 14th, 1891, to the jurisdiction of this court; and, after being fully advised

in the premises, the court overrules and denies said demurrer; to which the defendant excepts.

Then came on to be heard the demurrer of the plaintiffs to that portion of the answer of the defendant setting up the former adjudication between plaintiff W. R. Watkins and the defendant, Richard McLish; and, after being fully advised in the premises, the court sustains said demurrer and holds that said portion of said answer is insufficient in law; to which the defendant excepts.

The foregoing has the following endorsement, to wit: 38. A. B. Roff *et al. v.* Richard McLish. Journal entry of March 14th, 1891. Entered "A," 412.

In the United States Court for the Indian Territory, Third Division, at the March Term, 1891.

A. B. ROFF and W. R. WATKINS
vs.
RICHARD MCLISH. } No. 38.

Be it remembered that on the 14th day of March, 1891, that, the above cause being regularly called on the docket of this court for trial, the defendant called up for the consideration of this
15 court his demurrer to the jurisdiction of this court, contained in his amended answer filed on the 13th day of March, 1891, involving the jurisdiction of this court; which demurrers were overruled by the court, the court holding that it had jurisdiction to hear and determine this cause; to which defendant excepted, and whereupon the defendant claimed that the jurisdiction of this court over this suit was at issue and claimed that the court was without jurisdiction, and said that he desired to remove the cause by writ of error to the Supreme Court of the United States for its decision upon the question of jurisdiction involved, and requested this court to certify the question of jurisdiction involved to the Supreme Court of the United States for review, and the defendant then and there offering to file a petition for a writ of error and good and approved security within such reasonable time as this court should direct, and asked for reasonable time in which to file such reasonable security and obtain said writ of error, and asked that the court proceed no further with this cause until the jurisdiction should be decided by the Supreme Court; but the court thereupon denied said request and held that it was the duty of the court to proceed with the trial of the case notwithstanding said question of jurisdiction, and that this defendant could only appeal upon said question of jurisdiction to the Supreme Court of the United States from the final judgement of this court, and required the defendant to proceed with the trial of
16 the cause upon the merits; to all of which the defendant except- and tenders this his bill of exceptions and asks that the same be allowed and certified, which is accordingly done this March 14th, 1891.

JAMES M. SHACKELFORD,
Judge U. S. Court in the Indian Territory.

The foregoing has the following indorsement, to wit:
No. 38. A. B. Roff and W. R. Watkins *vs.* Richard McLish. Bill of exceptions. Filed in open court this 14th day of March, 1891. Wm. Nelson, clerk, by A. D. Matthews, deputy.

RICHARD MCLISH, Plaintiff in Error,
vs.
A. B. ROFF and W. R. WATKINS, Def'ts in Error.

To the honorable Chief Justice and the honorable associate justices of the Supreme Court of the United States:

Your petitioner, Richard McLish, complaining of A. B. Roff and W. R. Watkins, respectfully alleges that he is a member of the Chickasaw tribe of Indians by nativity and a resident of the Chickasaw Nation, in the Indian Territory, and that the said Watkins is a member of said tribe by marriage, and the said Roff is a member of said tribe by having intermarried with an adopted member thereof, and that each of them is a resident of said nation.

17 Your petitioner further alleges that there is now pending before the United States court of the Indian Territory, third division, at Ardmore, a suit, No. 38, wherein the said A. B. Roff and W. R. Watkins are plaintiffs and your petitioner is defendant, in which it is shown by the petition of said plaintiffs that the parties are members of said tribe of Indians as aforesaid.

Your petitioner further says that the object of said suit is to recover from your petitioner eight hundred acres of land situated in said nation and belonging to said tribe under treaties and laws of the United States and held by the members of said tribe in common, and that your petitioner has filed in said cause, before said court, demurrers and pleas putting in issue the jurisdiction of said court to hear and determine said cause, which demurrers and pleas have been overruled, and said court has assumed jurisdiction in said controversy, which your petitioner believes to be manifest error, and he desires to have said question of jurisdiction certified to this court for review. Wherefore he prays for a writ of error to said court and for a citation to the said Roff and Watkins, and that the error, if any, assuming jurisdiction in said cause be corrected.

W. O. DAVIS,
Attorney for Richard McLish, Plaintiff in Error.

18 The foregoing has the following endorsement, to wit: Richard McLish, pl'ff in error, *vs.* A. B. Roff and W. R. Watkins, def'ts in error. Petition for writ of error. Filed Apr. 13th, 1891. Wm. Nelson, clerk.

RICHARD MCLISH, Plaintiff in Error,
vs.
A. B. ROFF and W. R. WATKINS, Defendants in Error.

Whereas in cause No. 38, before the United States court for the Indian Territory, third division, at Ardmore, wherein the above-named Roff and Watkins are plaintiffs and Richard McLish is de-

fendant, the said McLish has applied for and obtained a writ of error to the Supreme Court of the United States:

Now, therefore, know all men by these presents that the said McLish, as principal, and L. P. Anderson, J. B. Spragins, and Sam. Daube, as sureties, acknowledge themselves jointly and severally bound and obliged to pay to the said Roff and Watkins the sum of five thousand dollars; to be void, however, upon condition that said McLish shall prosecute his said writ of error to effect, and in case he fail to make his plea good he shall answer all costs and damages that may be awarded against him.

Witness our hands and seals this March the 23d, A. D. 1891.

RICHARD McLISH. [SEAL.]
L. P. ANDERSON. [SEAL.]
J. B. SPRAGINS. [SEAL.]
SAM. DAUBE. [SEAL.]

19 The above bond is approved March 27th, 1891.

JAMES M. SHACKELFORD,
Judge U. S. Court in the Indian Territory.

The foregoing has the following endorsement, to wit:

Richard McLish, pl'ff in error, *vs.* A. B. Roff & W. R. Watkins, def'ts in error. Supersedeas bond. Richard McLish *vs.* A. B. Roff and W. R. Watkins. Bond. Filed April 13th, 1891. Wm. Nelson, clerk.

In the United States Court for the Indian Territory, 3rd Division, at Ardmore.

A. B. ROFF & W. R. WATKINS, Plaintiffs,
vs.
RICHARD McLISH, Def't.
} No. 38. Assignment of Error.

Now comes the defendant, Richard McLish, and respectfully says that there are the following errors in the proceedings of this cause:

1. The court erred in overruling defendant's first demurrer to the plaintiffs' first amended complaint and in taking jurisdiction of this cause.

2. The court erred in overruling defendant's second demurrer to the plaintiffs' first amended complaint and in taking jurisdiction of this cause.

3. The court erred in proceeding with this cause when its jurisdiction was in issue, as shown in defendant's bill of exceptions.

W. O. DAVIS,
Att'y for Richard McLish, the Plaintiff in Error.

20 The foregoing has the following endorsement, to wit:

A. B. Roff and W. R. Watkins *vs.* Richard McLish Assignment of error. Filed April 13th, 1891. Wm. Nelson, clerk.

The United States of America to A. B. Roff and W. R. Watkins, residents of Pickens county, Chickasaw Nation, Indian Territory, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington within thirty days from this date, pursuant to a writ of error filed *filed* in the clerk's office of the United States court for the Indian Territory, third division, at Ardmore, in case No. 38, wherein Richard McLish, the defendant in the court below, is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as — the said writ of error mentioned, should not be correct- and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this the 10th day of April, 1891.

Allowed by—

JAMES M. SHACKELFORD,
Judge of the United States Court for the Indian Territory.

The foregoing*going* has the following endorsement, to wit:

38. Richard McLish, plaintiff in error, *vs.* A. B. Roff and W. R. Watkins, defendants in error. Citation. Filed Apr. 13, 1891. Wm. Nelson, clerk. We acknowledge service of the within citation this the 13th day of April, A. D. 1891. Herbert and Ledbetten, Potter, Potter & Mathis, att'ys for W. R. Watkins and A. B. Roff.

21 THE UNITED STATES OF AMERICA:

To A. B. Roff and W. R. Watkins, residents of Pickens county, Chickasaw Nation, Indian Territory, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington within thirty days from this date, pursuant to a writ of error filed in the clerk's office of the United States court for the Indian Territory, third division, at Ardmore, in case No. 38, wherein Richard McLish, the defendant in the court below, is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this thirteenth day of April, 1891.

Allowed by—

JAMES M. SHACKELFORD,
Judge of the United States Court for the Indian Territory.

22 [Endorsed:] 38. Richard McLish, plaintiff in error, *vs.* A. B. Roff and W. R. Watkins, defendants in error. Citation. Filed Apr. 13, 1891. Wm. Nelson, clerk.

On this — day of ——, in the year of our Lord one thousand eight hundred and eighty —, personally appeared —— —— before me, the subscriber, and makes oath that he delivered a true copy of the within citation to —— ——.

—— ——.

Sworn to and subscribed the ——, A. D. 1891.

—— ——.

We acknowledge service of the within citation this the 13th day of April, A. D. 1891.

HERBERT & LEDBETTER,
POTTER, POTTER & MATHIS,
Att'ys for W. R. Watkins & A. B. Roff.

23 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the court of the United States for the Indian Territory, 3rd division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States court for the Indian Territory, between A. B. Roff and W. R. Watkins as plaintiffs and Richard McLish as defendant, No. 38, a manifest error hath happened in your assuming and taking jurisdiction in said cause, to the great damage of the said Richard McLish, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given assuming jurisdiction in said cause, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days from this date, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the thirteenth of April, in the year of our Lord one thousand eight hundred and ninety-one.

{ Seal United States Court, Third Division, in the Indian Territory. }

24 WM. NELSON, *Clerk*,
By A. D MATTHEWS,
Deputy Clerk of the United States Court for the Indian Territory.

Allowed by—

JAMES M. SHACKELFORD,
Judge of the United States for the Indian Territory.

In obedience to the foregoing writ of error I hereby certify to the Supreme Court of the United States a true copy of all of the proceedings in this cause relating to the jurisdiction of the United States court for the Indian Territory herein.

Witness my hand & seal of office, at Ardmore, in the Indian Territory, this the 5th day of May, 1891.

{ Seal United States Court, Third Division, in the Indian Territory. }

WM. NELSON, *Clerk*,
By A. D. MATTHEWS.

25 [Endorsed:] Richard McLish, plaintiff in error, *vs.* A. B. Roff and W. R. Watkins, defendants in error. Writ of error. Filed Apr. 13, 1891. Wm. Nelson, clerk. Original.

26 PICKENS COUNTY, }
Chickasaw Nation, Indian Territory, } *ss:*

I, William Nelson, clerk of the United States court for the Indian Territory, do certify that the foregoing twenty-two pages contain a true copy of all the proceedings in cause No. 38 on the docket of this court at Ardmore, wherein A. B. Roff and W. R. Watkins are plaintiffs and Richard McLish is defendant, pertaining to the question of the jurisdiction of said court in said cause, and also the original writ and citation in error.

Given under my hand and seal of office, at office, in Ardmore, this the 5th day of May, A. D. 1891.

{ Seal United States Court, Third Division, in the Indian Territory. }

WM. NELSON,
Clerk of U. S. Court for Indian Territory,
By A. D. MATTHEWS, *Deputy*.

[Endorsed:] Richard McLish, plaintiff in error, *vs.* A. B. Roff and W. R. Watkins, defendants in error. Transcript.

Endorsed on cover: Indian Territory U. S. court. No. 1766. Richard McLish, plaintiff in error, *vs.* A. B. Roff and W. R. Watkins. Filed May 11, 1891.

Office Supreme Court, U. S.
FILED,
OCT 8 1891
JAMES H. McKENNEY,
CLERK.

IN THE SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM—1891.

RICHARD McLISH,

PLAINTIFF IN ERROR.

VS.

A. B. ROFF AND W. R. WATKINS,

DEFENDANTS IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR

BY W. O. DAVIS.

1891.
HESPERIAN STEAM PRINTING HOUSE,
GAINESVILLE, TEXAS.

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I.

JURISDICTION OF THIS COURT.

The question of jurisdiction is fully discussed in the brief of Mr. Phillips, and it is needless for me to attempt to go over the same ground. As an original proposition, it will stand to reason that the jurisdiction of a court to try a case should be determined before the cause is actually tried. It saves time, expense, and often great hardship. When, as heretofore,

the same appellate court reviewed all questions arising in the case, whether relating to the jurisdiction of the court or otherwise, it has been deemed best to allow but one writ of error, and that from the final judgment. Of the questions arising in this case, however, this court can review only that relating to the jurisdiction of the lower court, while all other questions must go before the circuit court of appeals. If it should be held that a writ of error would not lie upon a question of jurisdiction until after final judgment, it would lead to consequences the most absurd. The question of jurisdiction would be certified to this court, while all other questions would be certified to the circuit court of appeals. The case would be before two separate appellate courts at one and the same time. The Supreme Court might dismiss the suit upon the question of jurisdiction, while the circuit court of appeals might properly affirm the judgment of the lower court upon its merits. Congress could not have intended such an absurd and incongruous system. But such consequences would follow unless a question of jurisdiction may be certified to this court in advance of the final judgment.

II.

A. B. Roff and W. R. Watkins on the 15th day of August, 1890, brought suit in the United States Court for the Indian Territory, at Ardmore, against Richard McLish to recover the possession of about 640 acres of land, situated in the Chickasaw Nation, and belonging to said tribe. By the first amended complaint, it was alleged that the plaintiffs were citizens and members of the Chickasaw tribe of Indians, having all the rights of native citizens, and that as citizens and members of such tribe they were entitled to the possession of said land; and that the defendant, McLish, was a member of said tribe by nativity. It was further alleged that the plaintiff, Watkins, became a member of said tribe by inter-marriage with Elizabeth Tyson, a member of said tribe by nativity, on the 15th day of November, 1865, and that the plaintiff, Roff, became a member of said

tribe by inter-marriage with Matilda Bourland, an adopted member of said tribe, during the year 1867, and that both plaintiffs had since their said marriages resided in said Chickasaw Nation. (1)

The defendant, McLish, demurred to the complaint, because:

First. It appears from the plaintiffs' amended complaint that the parties, plaintiff and defendant, are citizens of the Chickasaw Nation, or tribe of Indians, and that this court is without jurisdiction of the parties to the suit.

Second. It appears from the plaintiffs' amended complaint that the plaintiffs acquired their pretended rights because of their citizenship, and that this is a controversy between citizens of the Chickasaw tribe of Indians, of which the courts of said tribe have exclusive jurisdiction. (5)

The demurrers were overruled March 14th, 1891, and the lower court assumed jurisdiction. (7)

The defendant excepted and his bill of exceptions was allowed. (8) And upon this the writ of error was sued out to this court.

III.

The specifications of error were filed in the lower court on the 13th day of April, 1891, at the time of the granting of the writ of error, and omitting the style and number of the case, are as follows:

Now comes the defendant, Richard McLish, and respectfully says that there are the following errors in the proceedings of this cause:

1. The court erred in overruling defendant's first demurrer to the plaintiffs' first amended complaint, and in taking jurisdiction of this cause.

2. The court erred in overruling defendant's second demurrer to the plaintiffs' first amended complaint, and in taking jurisdiction of this cause.

3. The court erred in proceeding with this cause when its jurisdiction was in issue, as shown by defendant's bill of exception.

W. O. DAVIS,
Attorney for RICHARD McLISH,
Plaintiff in Error. (10)

IV.

The Chickasaw Indians before their removal to their present country resided east of the Mississippi River in what now constitutes parts of Alabama, Mississippi and Tennessee. It is known from history that the tribe always maintained friendly relations with the white man, and had but few wars either with the white settlers or the neighboring tribes of Indians. The early treaties between the Chickasaw Indians and the Government are found in the 7th Vol. of the United States Statutes at large. In the process of time the country east of the Mississippi River, and which was the old home of the Chickasaw Indians, was embraced within the boundaries of the states of Alabama, Mississippi and Tennessee. The Chickasaw Indians were made subject to the laws of the states in which they resided. This induced the Chickasaw Indians to seek a new home west of the Mississippi River, where they could maintain their tribal organization, and be governed by their own laws and customs. The hardship which encompassed the Chickasaws in their old home, and the motives which induced their emigration therefrom are forcibly expressed in the preamble to the treaty of October 20th, 1832, Vol. 7, page 381, U. S. Statutes at large, where it said:

"The Chickasaw Nation find themselves oppressed in their present" "situation, by being made subject to the laws of the states in which they" "reside. Being ignorant of the language and laws of the white man, they" "cannot understand or obey them. Rather than submit to this great evil," "they prefer to seek a home in the West, where they may live and be" "governed by their own laws."

"And believing that they can procure for themselves a home, in a" "country suited to their wants and condition, provided they had the means" "to contract and pay for the same, they have determined to sell their coun-" "try and hunt a new home. The President has heard the complaints of" "the Chiakasaws, and like them believes they cannot be happy or prosper-" "ous as a nation in their present situation and condition, and being" "desirous to relieve them from the great calamity that seems to await"

"them if they remain as they are, he has sent his commissioner, General"
"John Coffey, who has met the whole Chickasaw Nation in council, and"
"after mature deliberations they have entered into the following articles,"
"which shall be binding on both parties, when the same shall be ratified"
"by the President of the United States, by and with the advice and con-"
"sent of the Senate."

Under this preamble follows the treaty by which the Chickasaw Indians ceded to the United States their old home, and the United States guaranteed to the Chickasaw Indians the right to be governed by their own laws, in such new home as they might be able to find west of the Mississippi River. The purpose of the Chickasaw Indians in leaving their home east of the Mississippi River is still further shown in Article 2 of the treaty of May 24th, 1834, where it is said:

"The Chicksaws are about to abandon their homes which they have long cherished and loved, and though hitherto unsuccessful, they still hope to find a country adequate to the wants and support of their people somewhere west of the Mississippi, and within the territorial limit of the United States. Should they do so the government of the United States hereby consents to protect and defend them against the inroads of any other tribe of Indians, and from the whites, and agrees to keep them without the limits of any state or territory. The Chickasaws pledge themselves never to make war upon any Indian people, or upon the whites, unless they are so authorized by the United States; but if war be made upon them they will be permitted to defend themselves until assistance be given to them by the United States, as shall be the case."

The Choctaws, who were the old neighbors of the Chickasaws, impelled by like motives, had preceeded the Chickasaws in their movement to the west of the Mississippi, and had acquired by grant of the United States the country west of the Territory of Arkansas and north of Texas, and had been guaranteed by the United States the right to be governed by their own customs and laws, and trial before their own courts. The Chickasaws bought of the Choctaws the western portion of this territory and paid for

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it five hundred and thirty thousand dollars. Article 3 of the treaty of January 17th, 1837.

After this the Chickasaws and Choctaws in their dealings with the United States were considered as one tribe, and all the treaties since that time have been joint. The treaty between the United States and the Choctaw and Chickasaw Indians of June 22nd, 1855, is found in Revised Indian Treaties, page 274. The first article gives the boundaries of the Choctaw and Chickasaw Nation. The second article gives the boundaries of the Chickasaw district therein, and the third article gives the boundaries of the Choctow district. The first article also contains this provision:

"And persuant to an Act of Congress approved May 28th, 1830, the United States do hereby forever secure and guarantee the lands embraced within the said limits to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to be held in common; so that each and every member of either tribe shall have an equal undivided interest in the whole: Provided, however, no part thereof shall ever be sold without the consent of both tribes, and that said land shall revert to the United States if said Indians and their heirs become extinct, or abandon the same."

The following portions of the same treaty show that the Choctaws and Chickasaws were guaranteed the right of government by their own laws, and jnrisdiction over members of their respective tribes, including all white men who had become members of said tribes, whether by marriage or otherwise.

Article 7. "So far as it may be compatible with the Constitution of "the United States, and the laws made in pursuance thereof, regulating "trade and intercourse with the Indian tribes, the Choctaws and Chicka-"saws shall be secured in the unrestricted right of self government, and "full jurisdiction over the persons and property within their respective "limits; excepting, however, all persons with their property, who are not "by birth, adoption or otherwise, citizens or members of either the Choctaw "or Chickasaw tribe, and all persons not being citizens or members of "either tribe found within their limits, shall be considered intruders.

Article 14. "The United States shall protect the Choctaws and Chickasaws from domestic strife, from hostile invasion, and from aggression by other Indians and white persons not subject to their jurisdiction and laws; and for all injuries resulting from such invasion or aggression, full indemnity is hereby guaranteed to the party or parties injured, out of the treasury of the United States, upon the same principle and according to the same rules upon which white persons are entitled to indemnity for injuries or aggressions upon them, committed by Indians."

The treaty between the United States and the Choctaw and Chickasaw Indians of May 28th, 1866, 14 U. S. Statutes at large, page 769, renewed the guaranty of local self government, and makes it manifest that a white man who marries a Chickasaw woman and resides in the Chickasaw country and claims the rights of a Chickasaw Indian, is subject to their laws and amenable to their courts. This treaty is found in Revised Indian Treaties, page 285. Its provisions upon the subject are as follows:

Article 10. "The United States re-affirms all obligations arising out of treaty stipulations or acts of legislation with regard to the Choctaw and Chickasaw Nations, entered into prior to the late rebellion, and in force at that time, not inconsistent herewith; and further agrees to renew the payment of all annuities and other monies accruing under such treaty stipulations and acts of legislation, from and after the close of the fiscal year, ending on the thirtieth of June, in the year eighteen hundred and sixty-six."

Art. 38. "Every white person, who having married a Choctaw or Chickasaw resides in said Choctaw or Chickasaw Nation, or who has been adopted by the legislative authorities, is to be deemed a member of said Nation, and shall be subject to the laws of the Choctaw and Chickasaw Nations, according to his domicile, and prosecution and trial before their tribunals, and to punishment according to their laws, in all respects, as though he was a native Choctaw or Chickasaw."

Article 26. "The right here given to Choctaws and Chickasaws, respectively, shall extend to all persons who have become citizens by

adoption or inter-marriage of either of said Nations, or who may hereafter become such."

The right referred to in the 26th Section is the right to land in the Chickasaw district. The same treaty provides for the establishment of a United States Court for the Indian Territory, and clearly defines the jurisdiction and power of such court in the following provisions:

Article 7. "The Choctaws and Chickasaws agree to such legislation as Congress and the President of the United States may deem necessary for the better administration of justice, and the protection of the rights of persons and property within the Indian Territory: Provided, however, such legislation shall not in any wise interfere with or annul their present tribal organizations, or their respective legislatures or judiciaries, or the rights, laws, privileges or customs of the Choctaw and Chickasaw Nations, respectively."

Article 8—Section 8. "The Choctaws and Chickasaws also agree that a court or courts may be established in said Territory, with such jurisdiction and organization as Congress may prescribe: Provided, that the same shall not interfere with the local judiciary of either of said Nations."

The Chickasaw tribe of Indians have always observed in good faith their treaty obligations respecting white people who have inter-married with members of their tribe. The following, among other provisions, may be found in their constitution of August 16th, 1867:

Section 7—General Provisions. "All persons, other than Chickasaws, who have become citizens of this Nation, by marriage or adoption, and have been confirmed in all their rights as such, by former conventions, and all such persons as aforesaid, who have become citizens by adoption by the legislature, or by inter-marriage with the Chickasaws, since the adoption of the constitution of August 18, A. D., 1856, shall be entitled to all the rights, privileges and immunities of native citizens. All who may hereafter become citizens, either by marriage or adoption, shall be

entitled to all the privileges of native born citizens, without being eligible to the office of governor."

Section 3—Article 2. "All free male persons of the age of nineteen years and upwards, who are by birth or adoption members of the Chickasaw tribe of Indians, and not otherwise disqualified, and who shall have resided six months immediately preceeding any election in the Chickasaw Nation, shall be deemed qualified electors, under the authority of this constitution."

Section 3—Article 4. "No person shall be a representative unless he be a Chickasaw by birth or adoption, and shall have been an inhabitant of the Chickasaw Nation one year next preceeding his election, and the last six months thereof a citizen of the county for which he shall be chosen, and shall have attained to the age of twenty-one years at the time of his election."

Section 4—Article 4. "No person shall be a senator unless he be a Chickasaw by birth or adoption, and has been a citizen of the Chickasaw Nation one year next preceeding his election, and the last six months a citizen of the senatorial district for which he shall be chosen, and shall have attained to the age of thirty years at the time of his election."

In the light of the treaty obligations of the government the ingenuity of man can devise no excuse for a court of the United States assuming jurisdiction in a controversy between two Chickasaw Indians concerninge lands within their Nation, where the rights of the parties depend upon ther laws, customs and usages of the tribe.

In extending the criminal jurisdiction of its courts over the Indian country, the government has never attempted to violate its treaty obligations.

Section 2145. U. S. Rev. Statutes: "Except as to crimes the punishment of which is expressly provided for in this title, the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country."

Section 2146. "The preceeding section shall not be construed to extend to crimes committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where by treaty stipulations, the exclusive jurisdiction over such offense is, or may be secured to the Indian tribes respectively."

The United States District Court of Fort Smith, Arkansas, and at Paris, Texas, having criminal jurisdiction over the Indian country, have never claimed the right or power to try an offense committed by one Chickasaw Indian upon the person or property of another, and have always conceded that a white person who had married a Chickasaw and resided in the Chickasaw country should be regarded the same as a native Chickasaw Indian.

Congress prior to March 1st, 1889, established no court with civil jurisdiction in the Indian country, but at that time Congress passed an act to establish a United States Court for the Indian Territory and for other purposes. U. S. Statutes at large, Vol. 25, page 783.

The sixth section of this act defines the jurisdiction of the court, and is as follows:

Section 6. "That the court hereby established shall have jurisdiction in all civil cases between citizens of the United States who are residents of the Indian Territory, or between citizens of the United States or of any state or territory therein, and any citizen of or person or persons residing or found in the Indian Territory, and when the value of the thing in controversy, or damages, or money claimed shall amount to one hundred dollars or more: Provided, that nothing herein contained shall be so construed as to give the court jurisdiction over controversies between persons of Indian blood."

This act was passed at the close of the session, and bears upon its face evidence that it was hasty, and not well digested legislation, yet it contains nothing that can be properly construed as violating the treaty obligations of the government to the Chickasaw Indians. The body of

this section does not confer jurisdiction of a controversy between a Chickasaw by nativity and a Chickasaw by adoption. Whatever doubts may have arisen with respect to this act were in consequence of the peculiar verbiage of the proviso; but the proviso under no rule of construction could be held to enlarge the body of the section.

Baring vs. U. S., 19 Wal. 227.

N. Minus vs. U. S., 15 Pl., 423.

The proper construction, however, of section 6 is immaterial, for on May 2nd, 1890, Congress in the act providing for a government for Oklahoma and for other purposes, U. S. Statutes at large, Vol. 26, page 81, more clearly defines the jurisdiction of the UnitedS tates Court in the Indian Territory. Section 30 of this act contains the following proviso:

"Provided, however, that the judicial tribunals of the Indian Nations shall retain exclusive jurisdiction in all civil and criminal cases arising in the country in which members of the Nations by nativity or by adoption shall be the only parties."

Section 31 says: "But nothing in this act shall be so construed as to deprive any of the Courts of the Civilized Nations of exclusive jurisdiction over all cases arising, wherein members of said Nations, whether by treaty, blood or adoption, are the sole parties; nor so as to interfere with the right and power of said civilized Nations to punish said members for violation of the statutes and laws enacted by the National Councils, where such laws are not contrary to the treaties or law of the United States."

It must be remembered that under the treaties Congress could not rightfully confer jurisdiction upon the United States Court for the Indian Territory to try a controversy between members of the Chickasaw tribe, whether they become members by birth, treaty, marriage or otherwise. In construing a statute the Court in all decency presumes that the law-maker was actuated by good motives and attempted to do nothing except what he could rightfully do, and will not, therefore, construe a statute so as to violate a treaty, if it admits of any other construction. If

we concede that Congress has the power to violate a treaty, it is a rule of construction that the intent to do so must clearly appear. The act must admit of no other construction. The courts credit Congress with good motives and a scrupulous regard for the treaty obligations of the government, and, if possible, will so construe the act that it and the treaty may both stand.

The defendants, however, contend that, notwithstanding they are Chickasaw Indians, and, as such, have a right to live in the Indian country and enjoy the property rights of other members of the tribe, yet they are not amenable to the tribal courts, for they say they are not members of the tribe by birth, by adoption or by treaty, but that they are members by marriage. In other words they are full members for the purpose of acquiring property in the tribe, but are not members for the purpose of suing for the same. The term adopted, when speaking of small tribes or families of men like the Chickasaw Nation, means the same thing as naturalization when applied to the nations of the world. Nowhere in the laws of the Chickasaw Nation, or in the treaties of the government with that tribe, is the term "naturalization" used, but the word "adopted" is invariably used. If the English government should by special act confer the right of citizenship upon a Frenchman, he would be called a naturalized citizen; if the Chickasaw tribe of Indians should by special act confer the right of citizenship upon a white man, he would be called an adopted member of the tribe. In like manner, if the tribe should by general law provide that all white persons inter-marrying with members of the tribe should have the same rights as a member by nativity, the white persons so intermarrying would be called adopted members. In the 43d section of the treaty of 1866, supra, the word "adopted" is used so as to comprehend all members of the tribe otherwise than by nativity. In like manner in Section 3—Article 2, and Sections 3 and 4—Article 4, of the Chickasaw constitution, supra, the word "adoption" is used in a sense to include all members of the tribe otherwise than by birth. Under these provisions white men who had inter-married with Chickasaw women were permitted

to vote and hold office in like manner as members by nativity. Within the last two years when it was deemed wise to disfranchise the "squawman," it was necessary to amend the constitution in order to do so.

But what is meant by the term "member by treaty" as used in the act of May 2d, 1890? Under the 38th section of the treaty of 1866 Roff and Watkins are members of the Chickasaw tribe of Indians; that section regulates their rights and defines their status. The Chickasaw legislature, however, has complied with its treaty obligations and has passed laws in substance the same as Section 38 of the treaty. If a white man be unwilling to submit to the jurisdiction of the Chickasaw courts, why should he marry a Chickasaw woman? Why should he desire to reside in the country, claim an interest in their land, and invoke their laws. usages and customs in his behalf? If the burden does not bear lightly, it is one he has voluntarily assumed and can lay down at his pleasure, by removing therfrom.

In criminal cases and in matters of life and liberty a white man who has married a Chickasaw woman and resides in the Chickasaw country has always been amenable to the tribal courts. He could be tried there and not elsewhere. There has never been any complaint that the tribal courts in criminal cases have dealt unjustly or oppressively with adopted citizens charged with crime. In matters of life and liberty Roff and Watkins must appear before the tribal courts of the country in which they have voluntarily made themselves citizens. Why should they not also appear before the same court in a matter of dollars and cents? Does the United States government attach greater importance to their pockets than it does to their liberty or their lives? It is clear that the court should not have assumed jurisdiction of this controversy. It may be seriously doubted whether Mr. Roff is really a member of the tribe or has any rights in the Nation. But he alleges that he is a member, and bases his rights upon his alleged membership, and is estopped from denial. If he is not a member he has no right.

All of which is respectfully submitted.

W. O. DAVIS,
Attorney for Plaintiff in Error.

Office Supreme Court, U. S.
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CLERK.

IN THE

Supreme Court of the United States.

RICHARD McLISH,

vs.

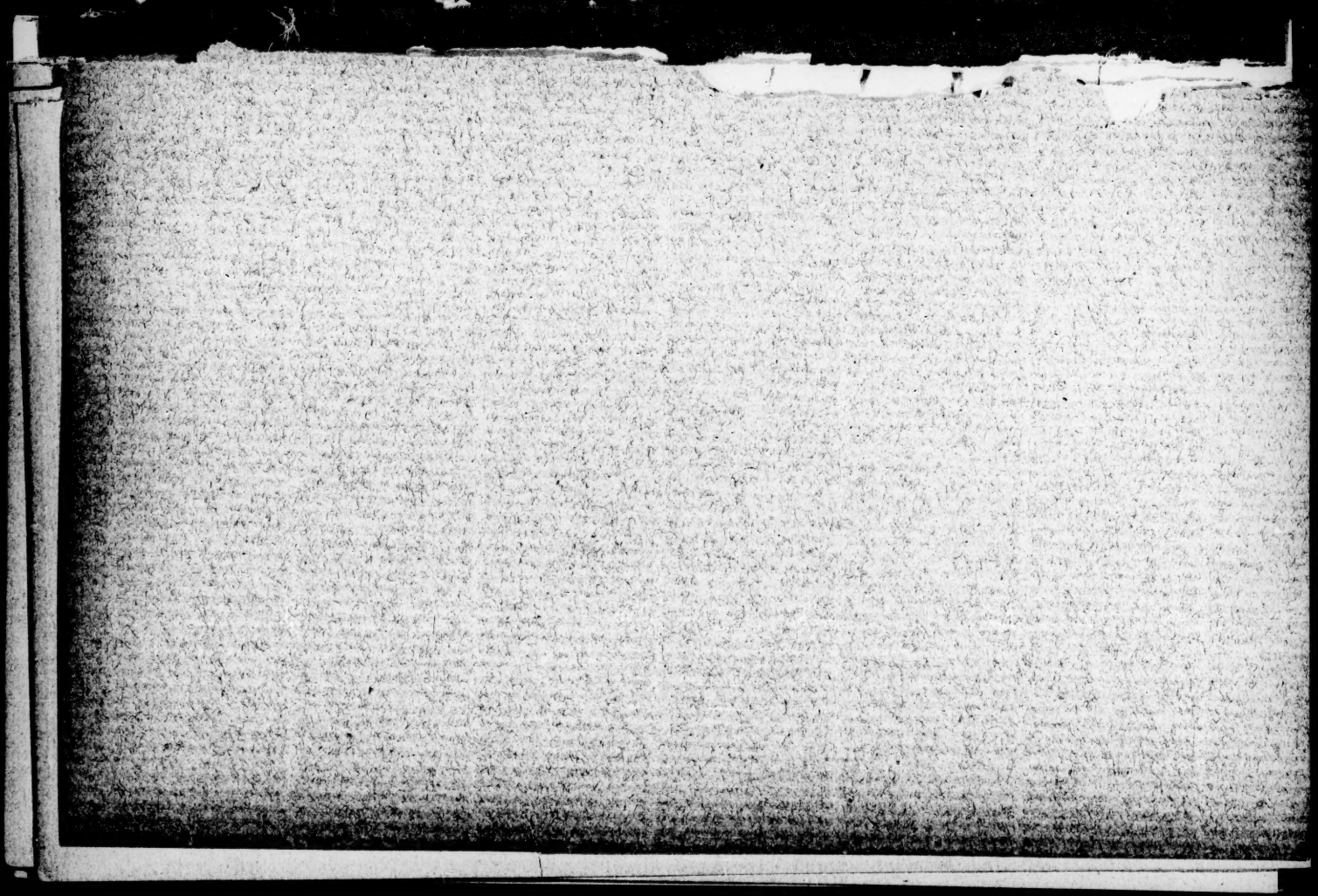
A. B. ROFF and W. R. WATKINS.

No. 1[illegible]5.
Advanced.

BRIEF.

W. HALLETT PHILLIPS,
For Plaintiff in Error.

R. O. Polkinhorn, Printer,



IN THE

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vs.

A. B. ROFF and W. R. WATKINS.

No. . . .
Advanced.

Brief of W. Hallett Phillips for Plaintiff in Error.

The question brought up by the record, relates to the jurisdiction of the United States Court for the Indian Territory, to entertain a suit wholly between members of the Chickasaw Nation, regarding land belonging to such nation.

The court below overruled the demurrer of the defendant, McLish, raising the objection, and held they had jurisdiction over the cause.

Thereupon McLish sued out a writ of error to this court.

Jurisdiction of this Court.

The defendant in error objects that this court is without jurisdiction to review the question, because there is no final judgment in the cause.

This, we submit, is not a valid objection.

The writ of error is prosecuted under the act of March 3, 1891, having been sued out May 13, 1891.

The act went immediately into effect on its enactment.

Ex parte Claason, 140 U. S.

Section 13 of that act provides:

> "Appeals and writs of error may be taken and prosecuted from the decisions of the United States court in the Indian Territory to the Supreme Court of the United States, or to the circuit court of appeals in the eighth circuit, in the same manner and under the same regulations as from the circuit or district courts of the United States, under this act."

This provision, placed the United States court in the Indian Territory, on the same footing as respects the appellate jurisdiction of this court, as that occupied by the circuit and district courts of the United States.

Section 5, of the above act provides:

> "That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases:
>
> *In any case* in which the jurisdiction of the court is in issue; *in such cases the question* of *jurisdiction alone* shall be certified to the Supreme Court from the court below for decision."

We submit that in the class of cases involving the question of jurisdiction, an appeal or writ of error will lie to this court whenever such question is de-

cided, and a final judgment or decree in the cause is not necessary before the revisory power is invoked.

(1) The act dispenses with any such requirement by not providing for it.

(2) The act shows such requirement was not necessary, by providing that the question of jurisdiction alone, should be certified to the Supreme Court.

As the appellate power can only be exercised in the decision of the single *question* of jurisdiction, the act does not require that the *cause* should proceed to final determination before such question can be decided here.

The act recognizes that it would be more appropriate for the court below to refrain from proceeding in the cause, until this court should decide whether there was any right to proceed.

Any other course would only result in delay and increased expense to the parties, while the whole proceeding on the merits would frequently be set aside by the decision against the jurisdiction.

None of the questions arising on the merits, can, under the act, come here.

When this court decides the question of jurisdiction in the affirmative, the cause then proceeds in the court below.

When the cause is finally adjudged, the only right of appeal on the merits is to the circuit court of appeals, unless the case is included in one of the classes mentioned in section five.

As to that tribunal, it is expressly provided:

> "SEC. 6. That the circuit courts of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error *final decision* in the district court and the existing circuit courts in all cases other than those provided for in the preceeding section of this act."

Here the requirement of finality of decision makes the omission of it in section five all the more expressive.

It shows that the final decision of the cause, except in the cases provided for in section 5, was to be reviewed by the court of appeals and not directly by the Supreme Court.

The very next sentence to that providing for review of jurisdictional cases, shows the legislature knew the exact meaning of the language they were using, and that they were careful to specify the cases, in which the revisory power of this court, was dependent on the finality of the judgment or decree.

It provides for an appeal to this court "from the *final* sentences and decrees in *prize cases;*" also "in cases of *conviction* of a capital or other infamous crime."

The main reason why finality of decision has been required in former acts as a prerequisite to the exercise of jurisdiction rests upon the impolicy of permitting a case to come here by piece meal.

But no such reason applies to the case we are considering.

The right of review under the new act is given by reason of the *question* involved, and the jurisdiction is

confined to the determination of that *question*. There can be no other review of the *case* here.

There is no reason at all why the determination of the question of jurisdiction should await the final result of the cause, and we have expressed some of the reasons, why a speedy and immediate decision by the revisory tribunal should be had.

Nor will a resort to the old law furnish an argument against our construction of the new act. On the contrary, our views will be thereby fortified.

The act of February 25, 1889, enacts:

> "That in all cases where a final judgment or decree shall be rendered in a circuit court of the United States in which there shall have been a question involving the jurisdiction of the court, the party against whom the judgment or decree is rendered shall be entitled to an appeal or writ of error to the Supreme Court of the United States to review such judgment or decree without reference to the amount of the same; but in cases where the decree or judgment does not exceed the sum of five thousand dollars, the Supreme Court shall not review any question raised upon the record except such question of jurisdiction."
>
> 25 Stat. 693.

If we regard the provision in section 5, of the act of 1891, as taken from the act of 1889, it is significant that the new act does not incorporate the requisite of finality.

This shows that the legislature intentionally, in the new law, gave a wider scope to the power of review, and did not make it depend on the question of finality.

It is not permissible when Congress says the power of review can be exercised in *any case* of jurisdiction, to restrict such review to *cases* only in which there exist finality.

The act of 1889 was repealed by that of 1891.

The latter act covers the whole field of the appellate jurisdiction of this court over the federal tribunals.

There is no more reason for requiring finality of judgment or decree, than in requiring a pecuniary value or any other requirement omitted in the present act.

It was the intention of Congress to make a new law, so far as the present law differed from the former. The new law, embracing all that was intended to be preserved of the old, omitting what was not so intended, became complete in itself and repealed all other law on the subject embraced within it. *Murdock* vs. *Memphis*, 20 Wall., 617.

Irrespective of this consideration, we are forbidden by the language of the new act from resorting to the old law. Section 4 provides that "all appeals by writ of error or otherwise, from said district courts shall only be subject to review in the Supreme Court of the United States or in the circuit court of appeals hereby established, as is hereinafter provided, and the review, by appeal, by writ of error, or otherwise, from the existing circuit courts shall be had only in the Supreme Court of the United States or in the circuit courts of appeals hereby established *according to the provisions of this act regulating the same.*"

And, by Section Fourteen, it is further enacted:

> "That section six hundred and ninety-one of the Revised Statutes of the United States, and section three of an act entitled 'An act to facilitate the disposition of cases in the Supreme Court and for other purposes,' approved February sixteenth, eighteen hundred and seventy-five, be, and the same are hereby, repealed. And all acts and parts of acts relating to appeals or writs of error inconsistent with the provisions for review by appeals or writs of error in the preceding sections five and six of this act are hereby repealed."

SECTION 691, R. S. contains the provision limiting the revisory power over judgments of the Circuit Court to final judgments.

The act of February 18, 1875, Section 3 limits review to cases involving over $5,000. 18 Stat., 315.

If any doubt could exist as to the meaning of Section 5 of the new act, it is dispelled by the direct repeal of such provisions of the old law, as limited the revisory power to final judgments and decrees.

We submit, therefore, that this court has jurisdiction of the writ of error.

Jurisdiction of the Court Below.

The question for decision is, whether the United States Court for the Indian Territory has jurisdiction of a suit brought by a member of the Chickasaw nation of Indians by inter-marriage, against another member of such nation by nativity, to recover land held in common by the nation.

The court overruled a demurrer to the declaration, and held in favor of the jurisdiction.

The defendant contends this was error and brings the case here for the determination of the question.

The status of the civilized nations of Indians within what is known as the Indian Territory, is established by numerous treaties, acts of legislation and declarations by this court.

Those nations occupy somewhat the position of territories of the United States as respects autonomy and jurisdiction.

Their independence is guaranteed. They have the right to legislate fully as regards property within their own country belonging to their people, or as regards the members of the tribe, or such persons as have connected themselves with it.

They are governed by their own laws. By the national council their laws are enacted, approved by their executive and carried into effect by an organized judiciary.

Mackey v. *Coxe*, 18 How., 102.

Article 7 of the Treaty with the Choctaws and Chickasaws, concluded June 22, 1855, provides:

> "So far as may be compatible with the constitution of the United States and the laws made in pursuance thereof, regulating trade and intercourse with the Indian tribes, the Choctaws and Chicasaws shall be secured in the unrestricted right of self government, and full jurisdiction over all persons and property within their respective limits; excepting, however, all

persons with their property, who are not by birth, adoption or otherwise citizens or members of either the Choctaws or Chickasaw tribe, and all persons not being citizens or members of either tribe, found within their limits, shall be considered intruders." * * * *

11 Stat. 612.

The jurisdiction of the nation, originally recognized by treaty, has always been observed in the legislation of Congress, and no where more carefully than in the acts organizing a United States Court in the Indian Territory.

The act of March 1, 1889, § 6, provides:

"That the court hereby established shall have jurisdiction in all civil cases between *citizens of the United States*, who are residents of the Indian Territory or between *citizens of the United States*, or any State or Territory therein, and any citizen of, or person or persons, residing, or found in the Indian Territory, and when the value of the thing in controversy, or damages or money claimed shall amount to one hundred dollars or more. *Provided*, That nothing here contained shall be so construed as to give the court jurisdiction over controversies between persons of Indian blood only." 25 Stat., 784.

The act of May 2, 1890 (26 Stat., 81), is entitled "an act to provide a temporary government for the Territory of Oklahoma, to enlarge the jurisdiction of the United States Court in the Indian Territory, and for other purposes." The thirtieth section of this act contains the following proviso:

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> "That the judicial tribunals of the Indian

> nation shall retain exclusive jurisdiction in all civil and criminal cases arising in the country *in which members of the nation by nativity, or by adoption* shall be *the only parties.*"

The thirty-first section of said act also contains the following as its concluding paragraph:

> "The Constitution of the United States and all general laws of the United States which prohibit crimes and misdemeanors in any place within the sole and exclusive jurisdiction of the United States, except in the District of Columbia, and all laws relating to national banking associations, shall have the same force and effect in the Indian Territory as elsewhere in the United States; but nothing in this act *shall be so construed as to deprive any of the courts of the civilized nations of exclusive jurisdiction over all cases arising wherein members of said nation, whether by treaty, blood, or adoption, are the sole parties, nor so as to interfere with the right and power* of said civilized nations to punish said members for violation of the statutes and laws enacted by their national councils where such laws are not contrary to the treaties and laws of the United States."

Speaking of these latter provisions, this court, in *ex parte* Mayfield, say:

> "The policy of Congress has evidently been to vest in the inhabitants of the Indian country such power of self-government as was thought to be consistent with the safety of the white population with which they may have come in contact, and to encourage them as far as possible in raising themselves to our standard of civilization. We are bound to recognize and respect such policy, and to construe the acts of

the legislative authority in consonance therewith. The *general object of these statutes is to vest in the court of the nation jurisdiction of all controversies between Indians, or where a member of the nation is the only party to the* proceeding, and to reserve to the courts of the United States jurisdiction of all actions to which its own citizens are parties on either side." 140, U. S.

In that case the question was whether Mayfield was amenable in the courts of the United States to be tried and punished for adultery, an offence punishable under the laws of the United States but not under the laws of the Cherokees.

Say the Court:

> "As Mayfield was a member of the Cherokee Nation by adoption, if not by nativity, and was the sole party to these proceedings, we think it clear that under the treaties and acts of Congress he is amenable only to the courts of the nation."

On the face of the complaint in the case at bar, it appears that "the plaintiffs are *both members and citizens of the Chickasaw nation by intermarriage*," and that the "defendant is a member of the tribe of Chickasaw Indians *by blood*."

The dispute, therefore, is wholly between members of the Chickasaw nation.

Moreover, the subject matter concerned land held in community by the nation, and the rights of the respective parties thereto had already been adjudicated by the Chickasaw courts. (R., 6.)

It is true that the plaintiff Roff avers that the Chickasaw legislature had passed an act, alleged to be illegal, repealing the act by which his wife was adopted as a member of the tribe.

He also alleges "that the courts of the Chickasaw nation have refused to entertain jurisdiction or take cognizance of any controversy between himself and citizens of said Chickasaw nation, but have and do yet refuse to protect him in his property rights as such citizen or member of said tribe of Chickasaw Indians." R., 2.

But these allegations do not confer jurisdiction on the courts of the United States.

In the language of this court "a member of an Indian tribe cannot at will be alternately a citizen of the United States and a member of the tribe."

Elk vs. *Wilkins*, 112 U. S., 103.

Roff, by becoming a member of the tribe, made himself amenable to its laws, and submitted himself to its jurisdiction.

Whatever property rights he derived were as a member of the nation, and he must look to the nation alone for their protection.

He cannot, on an allegation of a denial of justice, seek the interposition of the courts of the United States on appeal from the determination of the courts of the nation.

The jurisdiction of the Indian courts in such a controversy, is exclusive.

The position of the plaintiffs is no different by reason of the facts that they are members of the nation by intermarriage, than it would have been if they had been members of the nation by blood and nativity.

The test of jurisdiction is *membership* in the nation, and that irrespective of how such membership was acquired.

This follows from the terms of the treaty and the recognition by our Government of the plenary jurisdiction of the Chickasaw Nation over its own members.

Nor can any argument be founded on the omission of membership by *intermarriage* in the act before referred to, where it provides that the judicial tribunals of the Indian Nations shall retain exclusive jurisdiction in all civil cases "in which members of the nation by *nativity or by adoption* shall be the only parties;" or where it says, "that nothing in this act shall be so construed as to deprive any of the courts of the civilized nations of exclusive jurisdiction over all cases arising wherein *members of said nations, whether by treaty, blood or adoption*, are the sole parties."

There is no rule of construction which requires this enumeration of different classes of citizens of the nations, over which the Indian jurisdiction is still to be retained, to be considered as exclusive of all other classes of members not particularly mentioned.

It was only a saving clause introduced into the act. Such act which did not pretend to confer jurisdiction on the United States Court over controversies wholly between members of the nation, or to divest that previously exercised by the Indian courts.

It would throw into inextricable confusion the now well regulated system of local government existing in the civilized tribes of the Indian Territory, if it were to be held that members of a tribe, deriving their rights from tribal law, might carry their controversies from the tribal courts appointed for their adjustment, and have them determined by a different system of laws under a different jurisdiction.

Such a result would be opposed to the uniform policy, to make the civilized nations self-governing as to matters concerning alone property and persons of their members.

Such, in short, is the question of jurisdiction which we say the court below erroneously decided by overruling the demurrer and assuming jurisdiction of the cause.

For a more extended consideration of the subject, we refer the court to the brief of our associate, Mr. Davis.

We submit, that the judgment should be reversed, with directions to dismiss the complaint for want of jurisdiction.

W. HALLETT PHILLIPS,
For Plaintiff in Error.

Office Supreme Court U. S.
FILED.
OCT 5 1891
JAMES H. McKENNEY,
CLERK

IN THE SUPREME COURT

OF THE UNITED STATES,

OCTOBER TERM---1891.

RICHARD McLISH,

PLAINTIFF IN ERROR.

VS.

A. B. ROFF AND W. R. WATKINS.

DEFENDANTS IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

BY W. A. LEDBETTER.

1891:
CHIEFTAIN STEAM PRINTING HOUSE,
ARDMORE, IND. TER.

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I

We concur in the statement by Mr. Davis, in his brief, as far as it goes, but in the first amended complaint, filed by defendants in error, in the court below, this additional allegation is found: "The plaintiffs allege and show to the court that the defendant, Richard McLish, is a member of the tribe of Chickasaw Indians, by BLOOD, and that both the plaintiffs, A. B. Roff and W. R. Watkins, were born in the United States of America and are now and have always been citizens of the United States; that said Roff and Watkins are both members and citizens of the Chickasaw tribe of Indians by INTERMARRIAGE, and that they nor either of them are citizens or members of the Chickasaw or Choctaw tribes of Indians by NATIVITY or ADOPTION; that the plaintiffs nor either of them have ever RENOUNCED their allegiance to the government of the United States of America, and that they nor either of them have ever taken the oath of allegiance to the government known as the Chickasaw government."—[R-1]

II

JURISDICTION OF THIS COURT.

Since the decision of Ex-parte Claason, 140 U. S., we do not longer question the jurisdiction of this court to hear and pass upon the jurisdictional question raised in this cause, but in our opinion, if the act of March 3, 1891 went into effect immediately, the writ of error was properly allowed.and a trial and determination of the cause upon its merits in the court below was not a necessary condition precedent to the prosecution of the writ of error in this court upon the question of JURISDICTION ALONE.

III

JURISDICTION OF THE COURT BELOW.

The sole and only question for this court to pass upon is this: Has the United States court in the Indian Territory the right to hear and determine controversies between a member of the Chickasaw tribe of Indians by BLOOD, and a member of said tribe by INTERMARRIAGE.

In the treaty of 1866 between the United States and the Choctaw and Chickasaw tribes of Indians, this language is used:

"The Choctaws and Chickasaws agree to such legislation as con-"gress and the president of the United States may deem necessary for "the better administration of justice and the protection of rights of per-"son or property within the Indian Territory. Provided, however, "such legislation shall not in anywise interfere with or annul their "present tribal organization, or their respective legislature or legisla-"tures or judiciaries, or the rights, laws, privileges or customs of the "Choctaw and Chickasaw Nations respectively."—See Art. 7, p. 289, Revision of Indian Treaties.

Section 8, Art. 8 reads as follows: "The Choctaws and Chicka-"saws also agree that a court or courts may be established in the said "territory with such juri-diction and organization as congress may "prescribe. Provided, the same shall not interfere with the local ju-"diciary of either of said nations."—Revised Indian Treaties, p. 291.

Pursuant to such treaties, congress passed an act March 1, 1889, establishing a court in the Indian Territory, of which Sec. 6 provides: "That the court hereby established shall have jurisdiction in all civil "cases between citizens of the United States, who are residents of the "Indian Territory or between citizens of the United States, or any "state or territory therein, and any citizen of, or person or persons, re-"siding, or found in the Indian Territory, and when the value of the "thing in controversy, or damages, or money claimed shall amount to "one hundred dollars or more, Provided, that nothing herein contained "shall be so construed as to give the court jurisdiction over controver-"sies between persons of INDIAN BLOOD ONLY."—25 Stat. 784.

Now under this section of the law there can be no question but that the United States court in the Indian Territory would have jurisdiction of a suit between a Chickasaw Indian BY INTERMARRIAGE and an Indian BY BLOOD. But it is contended the act of congress of May 2, 1890, [26 Stat. 81.] an act providing a temporary government for Oklahoma and to enlarge the jurisdiction of the United States court in the Indian Territory, so limited the jurisdiction of said court, that if

the act of March, 1889, conferred such jurisdiction upon the court, it was taken from it by act of congress, May 2, 1890. Section 30 of act May 2, 1890, [26 Stat. 81.] after providing for a division of the Indian Territory into three judicial divisions, the places and terms of holding court therein, the appointment of deputy clerks and marshals, the selecting of jurors, &c, reads as follows:

"And all civil suits shall be brought in the division in which the "defendant or defendants reside or may be found; but if there be two "or more defendants residing in different divisions, the action may be "brought in any division in which either of said defendants reside or "be found. And all cases shall be tried in the division in which the "process is returnable as herein provided, unless such judge shall di- "rect such case to be removed to one of the other divisions Provided, "however, that the judicial tribunals of the Indian Nations shall retain "exclusive jurisdiction in all civil and criminal cases arising in the "country in which members of the nation by NATIVITY OR BY ADOPTION "shall be the only parties; and as to all such cases the law of the state "of Arkansas extended over and put in force in said Indian Territory "by this act shall not apply."—[26 Stat. 81.]

Under this section, it seems to us that if Roff and Watkins, defendants in error, are citizens of the Chickasaw tribe of Indians by INTERMARRIAGE and McLish is a citizen or member of such tribe by BLOOD that the court unquestionably had jurisdiction of the parties, unless this court should hold that "adoption" and "intermarriage" a e synonymous terms and have the same meaning. In our view of the status and citizenship of the tribe of Chickasaw Indians, there are three distinct classes of citizens, 1st, citizens by birth; 2nd, citizens by adoption, and 3rd, citizens by marriage; that is to say, the blooded Indian, the member who is adopted by the Indian legislature, and he who becomes a citizen by reason of his marriage with an Indian.

The Chickasaw Indians both in their constitution and laws have thus recognized these THREE distinct classes of citizens and have al always treated them as three distinct classes. Thus it is alleged in the complaint filed in the court below that in the year 1856 the legislature of the Chickasaw Nation passed an act adopting as citizens of said nation the heirs of Wm. Bourland, one of whom, Matilda Bourland, was the wife of A. B. Roff. [R-1]

Now we take it that Matilda Bourland became a member of said tribe by ADOPTION and Roff, having married her, became a member of the tribe by INTERMARRIAGE, the same as if he had married an INDIAN BY BLOOD.

Art. 2, Sec. 2, Constitution of the Chickasaw Nation of 1867, relating to SUFFRAGE, reads as follows:

"All free male persons of the age of nineteen years and upwards, "who are by BIRTH OR ADOPTION members of the Chickasaw tribe of In- "dians, and not otherwise disqualified, and who shall have resided six "months immediately preceeding any election in the Chickasaw Na- "tion, shall be deemed qualified electors, under the authority of this "constitution."

Art. 5, Sec. 3, same constitution, relating to ELIGIBILITY OF GOVERNOR reads:

"No person shall be eligible to the office of governor unless he "shall have attained the age of thirty years, and shall have been a "resident of the nation for one year next preceeding his election. "Neither shall any person, except a CHICKASAW BY BIRTH, or AN ADOPT-"ED MEMBER OF THE TRIBE, at the time of the adoption of this consti-"tution, be eligible to the office of governor."

General Provisions, Sec. 7, same constitution, in defining the RIGHTS OF THE CHICKASAW CITIZEN reads:

"That every white person, WHO HAVING MARRIED A CHICKASAW IN-"DIAN OR WHO HAS BEEN ADOPTED BY THE LEGISLATIVE AUTHORITIES OF "SAID NATION shall be entitled to all the rights, privileges and immu-"nities guaranteed to them only by the thirty-eighth article of the "treaty of 1866 with the Choctaw and Chickasaw Indians."

Same constitution, Sec. 10, General Provisions, provides for ADOPTION OF PERSONS AS CITIZENS of such tribe, as follows:

"The legislature shall have power by law to admit or adopt as "citizens of this nation, such persons as may be acceptable to the peo-"ple at large."

The 38th Article of the treaty of 1866 with the Choctaws and Chickasaws, [See Revised Indian Treaties, p. 300,] reads:

"Art. 38. Every white person who, HAVING MARRIED A CHOCTAW "OR CHICKASAW, resides in the said Choctaw or Chickasaw Nation, OR "WHO HAS BEEN ADOPTED BY LEGISLATIVE AUTHORITIES, is to be deemed "a member of said nation, and shall be subject to the laws of the "Choctaw and Chickasaw Nations according to his domicile, and to "prosecution and trial before their tribunals, and to punishment accord-"ing to their laws in all respects as though he was a native Choctaw or "Chickasaw."

It will thus be seen that the United States government has recognized these three distinct classes of citizens, to-wit: CITIZENS BY BLOOD, CITIZENS ADOPTED BY ACT OF THE CHICKASAW LEGISLATURE, AND CITIZENS BY INTERMARRIAGE. And that in following up these plain distinctions the Chickasaw Indians, in their constitution, in treating the subject of SUFFRAGE, ELIGIBILITY OF GOVERNOR, and the ADOPTION of persons by legislative authority, have not varied one iota, but have always recognized three separate and distinct classes of Chickasaw citizens—as contemplated by Sec. 38 of said treaty.

There is a strong reason why this distinction should be made. A white man is adopted into the Chickasaw nation by the legislature thereof because of long and intimate association with the Indians, or special services rendered them as missionaries or otherwise and because he would be acceptable to the Indian people at large. To be adopted requires the consent of the nation expressed through the legislature. It is quite sure no one would be thus adopted unless he was identified with the Indians and they were friendly with him. His rights would be safe in their hands and in their courts. Not so with an intermarried citizen. A white man may become an intermarried citizen by obtaining the consent of an Indian woman to become his wife and by consummating such agreement. In this way a large number of white men, United States citizens, have become citizens of the Chickasaw Nation. Against this class of citizens there is naturally

the deepest prejudice among the Indians and that is why their rights should be litigated in the United States court for the Indian Territory.

The treaty of 1866, Sec. 38, the constitution and laws of the Chickasaw Nation recognize as members of the Chickasaw tribe of Indians all United States citizens who marry Chickasaw Indians, although by amendment of their constitution and laws the Chickasaws did in 1888 deprive the INTERMARRIED citizens of the right to vote. To hold that to confer jurisdiction of a cause between A CITIZEN BY BLOOD and an INTERMARRIED CITIZEN of the Chickasaw Nation is violative of the Choctaw and Chickasaw treaty of 1866, to us seems absurd. In what way does the exercise of such jurisdiction "interfere with or annul the tribal organization, legislature or judiciaries, rights, laws and customs of the Chickasaw Nation? If it does not interfere the court below has jurisdiction. Now, let us see, suppose the case of defendants in error against plaintiff in error is prosecuted to final judgment in the court below, by what laws, rights and customs, by what rule of decision, must their respective rights be adjusted? Unquestionably in accordance with the laws and constitution of the Chickasaw government, and the treaties which gave such government life, and by and under which said government has thus far been perpetuated. How can it be seriously contended that the adjudication of the Indians' rights in a United States court, created for that purpose, is violative of the treaty of 1866, or in anywise "interferes with or tends to annul their present tribal organization, their legislature, judiciaries, privileges or customs." Should either the plaintiff or the defendants in error recover in the court below, would not the status of the Chickasaw Indians, their tribal organization, legislatures and judiciaries, laws and customs remain the same? If not, in what way or in what respect would they be interfered with or annulled? Thus much we have said covering the treaty of the Choctaws and Chickasaws of 1866, and the act of congress of March, 1889, and the amended act of May 2, 1890, to show that there is not and cannot be any conflict between this treaty and the acts referred to. But admit that the acts of congress do contravene or modify such treaty, or former treaties, this court has held that THE ACT OF CONGRESS and NOT THE TREATY must govern. In case of U. S. vs. Kagama et al, 118 U. S. 375, [quoting from the Syllobus] Justice Miller, delivering the opinion of the court, said:

"While the government of the United States has recognized in the "Indian tribes heretofore a state of semi-independence and pupilage, it "has the right and authority INSTEAD OF CONTROLLING THEM BY TREATIES "TO GOVERN THEM BY ACTS OF CONGRESS, because they are within the geo- "graphical limits of the United States, and are necessarily subject to the "laws which congress may enact for their protection and for the pro- "tection of the people with whom they come in contact."

But this doctrine is too well settled to admit of question. Then if the acts of congress of March, 1889, and of May, 1890, have conferred jurisdiction upon the U. S. court of the Indian Territory, of controversies between the Chickasaw citizen by blood and the Chickasaw citizen by intermarriage, whether in keeping with or in contravention of the treaty of 1866, or former treaties, it seems to us is immaterial in the determination of the question of jurisdiction raised in this cause.

It is contended, however, that Section 31 of the act of congress, May 2, 1890, [25 Stat. 784] must be considered to ascertain the intent of congress and the jurisdiction of the court below. The following provision is contained in said section:

"The constitution of the United States and all the general laws of "the United States which prohibit CRIMES AND MISDEMEANORS in any "place within the sole and exclusive jurisdiction of the United States, "except in the District of Columbia, and all laws relating to NATIONAL "BANKING ASSOCIATIONS, shall have the same force and effect in the In-"dian Territory as elsewhere in the United States; but nothing in this "act shall be so construed as to deprive any of the courts of the civilized "nations of exclusive jurisdiction over all cases arising wherein mem-"bers of said nation, whether by TREATY, BLOOD OR ADOPTION, are the "sole parties, nor as to interfere with the right and power of said civi-"lized nations to punish said members FOR VIOLATION OF THE STATUTES "AND LAWS ENACTED BY THEIR NATIONAL COUNCILS where such laws are "not contrary to the treaties and laws of the United States."

What is meant by the language "members of said nation by TREATY, BLOOD OR ADOPTION? or rather, what is meant by "members of said nation by TREATY?"

At the close of the late rebellion there were in the Creek and Cherokee Nations about 18,000 negroes, former slaves of the Creek and Cherokee Indians, and these negroes, by treaties between the United States and the Creek and Cherokee Nations, respectively, were made citizens.

Article 2 of the treaty of 1866, made with the Creeks [page 116 Revised Indian Treaties] reads:

"The Creeks hereby covenant and agree that henceforth neither "slavery nor involuntary servitude, otherwise than in the punishment "of crimes, whereof the parties have been duly convicted in accordance "with laws applicable to all members of said tribe, shall ever exist in "said nation, and inasmuch as there are among the Creeks many per-"sons of African descent, who have no interest in the soil, it is stipu-"lated that hereafter THESE PERSONS lawfully residing in said Creek "country under their laws and usages, or who have been thus residing "in said country, and may return within one year from the ratification "of this TREATY, and their descendants and such others of the same "race as may be permitted by the laws of the said nation to settle "within the limits of the jurisdiction of the Creek Nation as citizens, "[thereof,] shall enjoy all the rights and privileges of native citizens, "including an equal interest in the soil and national funds, and the "laws of said nation shall be equally as binding upon and give equal "protection to all such persons, and all others, of whatsoever race or "color, who may be ADOPTED as citizens or members of said tribe."

Article 9 of the treaty of 1866 with the Cherokee Nation [Revision of Indian Treaties, page 89] reads:

"Art. 9. The Cherokee nation having, voluntarily, in February, "eighteen hundred and sixty-three, by an act of their national council, "forever abolished slavery, hereby covenant and agree that never here-"after shall slavery or involuntary servitude exist in their nation "otherwise than in the punishment of crime, whereof the party shall

"have been duly convicted, in accordance with laws applicable to all "the members of said tribe alike. They further agree that all freedmen "who have been liberated by voluntary act of their former owners or "by law, as well as all free colored persons who were in the country at "the commencement of the rebellion, and are now residents therein, or "who may enter within six months, and their decendants, shall have "all the rights of native Cherokees; PROVIDED, That owners of slaves "so emancipated in the Cherokee Nation shall never receive any com-"pensation or pay for the slaves so emancipated."

The act of March, 1889, creating the United States court in the Indian Territory, [25 Stat. 784] and the act of May 2, 1890, amendatory thereof, [26 Stat. 81] are laws establishing courts and prescribing jurisdiction therefor within the territory comprised of the five civilized Indian nations, viz: Creek, Cherokee, Seminole, Choctaw and Chickasaw, and, in our opinion, the language "members of said nation by treaty" found in act May 2, 1890, Sec. 31, [26 Stat. 81,] simply meant such members of the Indian tribes as were made so by TREATY between the United States government and the respective civilized tribes of Indians. To make persons CITIZENS BY TREATY presupposes an agreement between two or more governments that certain persons may become citizens, as was the case of the negroes in the Creek and Cherokee Nations when these treaties were made. The Creeks and Cherokees, by legislative authority, in the absence of a treaty, might have adopted certain persons as citizens, or prescribed certain conditions precedent to be performed before they could acquire such citizenship, but citizenship acquired in this way could not make them CITIZENS BY TREATY. The United States might by treaty with Spain, France or England make its citizens now residing there citizens of those respective places, but if an American citizen should take the oath of allegiance to the republic of France, or the Kingdom of Great Britain, renouncing his allegiance to the government of the United States, he would, by means of his own volition, and not by treaty, become a citizen of said foreign country.

In the treaty made between France and the United States [under which Louisiana was ceded] the third article of which reads:

"The innabitants of the ceded territory shall be incorporated in "the union of the United States, and admitted as soon as possible, ac-"cording to the principles of the federal constitution, to the enjoyment "of all the RIGHTS, ADNANTAGES, AND IMMUNITIES OF CITIZENS OF THE "UNITED STATES, and in the meantime they shall be maintained and "protected in the free enjoyment of their liberty, property and religion "which they possess."

Thus it is seen that the inhabitants of Louisiana by TREATY between the United States and France were made citizens of the United States. And we take it that the Frenchmen who subsequently came to the United States and took the oath of allegiance thereto and renounced allegiance to his native government, and all others, ipso facto became a citizen from his own volition and not by TREATY. But should the court hold that the Chickasaw courts have exclusive jurisdiction of the parties when the sole parties are Chickasaw citizens by TREATY, BIRTH, ADOPTION OR INTERMARRIAGE, we would with respect call their

attention to the following allegation in the complaint of defendants in error filed in the court below:

"The plaintiff, A. B. Roff, alleges that about the year 1856 the legislature of the Chickasaw Nation passed an act adopting as citizens of said Chickasaw Nation the heirs of Wm. Bourland, to-wit: Amanda, Gordentia, and Rem Hannah Bourland, and that on the 7th day of October 1876, said legislature passed another and different act affirming and adopting said act passed about the year 1856, aforesaid; that during the year 1867 this plaintiff, A. B. Roff, was duly and legally MARRIED TO SAID MATILDA BOURLAND, a daughter and heir-at-law of said Wm. Bourland, and that they continued to live together as husband and wife until his said wife died, to-wit: on the 1st day of March, 1869, and that this plaintiff, A. B. Roff, alleges that during the year 1856, by reason and virtue of said act of the Chickasaw legislature, the said Matilda Bourland became and was a member of the tribe of Chickasaw Indians BY ADOPTION, and that by reason of said Roff's intermarriage with said Matilda Bourland, to-wit: about the year 1867, he, the said plaintiff, A. B. Roff, became and was a citizen and member of the Chickasaw tribe of Indians by intermarriage; and this plaintiff alleges that by reason of the passage of said act of the Chickasaw legislature in the year 1856, adopting the heirs of the said Wm. Bourland as citizens and members of the tribe of Chickasaw Indians, as aforesaid, and the subsequent act passed by the legislature, to-wit: October 7th, 1876, confirming and approving said act last aforesaid, and by reason of said intermarriage with said Matilda Bourland, as aforesaid, this plaintiff, A. B. Roff, by intermarriage acquired the VESTED and IRREVOCABLE rights of a citizen or member of the Chickasaw tribe of Indians, as granted by the constitution and laws of the Chickasaw government, by the constitution and laws of the United States, and by treaties made by said tribe of Indians with the United States; and that ever since his intermarriage with said Matilda Bourland, in the year 1867, this plaintiff, Roff, has resided in the said Chickasaw Nation, claiming and exercising the rights of a citizen of said Indian tribe; but this plaintiff, Roff, alleges and shows to the court that said Chickasaw legislature, without authority of law and contrary to and in violation of the constitution and laws of the United Stated of America, and contrary to and in violation of the constitution of said Chickasaw government, and contrary to and in violation of the treaties then existing between said tribe of Chickasaw Indians and the United States government, on, to-wit: the 13th day of October, 1883, passed an act purporting to repeal said acts of said legislature adopting as citizens and members of said tribe of Indians the heirs of said Wm. Bourland, hereinbefore mentioned. And this plaintiff, A. B. Roff, alleges and shows to the court that since the passage of said last named act by said Chickasaw legislature, as aforesaid, that the Chickasaw government, its courts and officers have ignored and wholly repudiated this plaintiff's citizenship acquired at the time and in the manner aforesaid; and this plaintiff further alleges that the courts of said Chickasaw Nation have refused to entertain jurisdiction, or take cognizance, of any controversy between himself and citizens of said Chickasaw Nation, but have and do yet refuse to protect him in his

property rights as such citizen or member of said tribe of Chickasaw Indians." [R 1 and 2]

It will be seen that Roff has always been a citizen of the United States and has never renounced his allegiance to such government or sworn allegiance to any other government. [R 1] He is a member of the tribe of Chickasaw Indians by INTERMARRIAGE, but it seems the Chickasaw legislature by the passage of an unconstitutional law have undertaken to divest him of the vested right of citizenship, upon which is dependant the right to own property, and by reason of this void act of the Chickasaw legislature the Indian courts, in keeping with such act, refuse to entertain jurisdiction of his property rights, but allow the blooded or adopted Indian to seize, convert and appropriate his property with impunity. According to the brief of council for plaintiff in error, Roff has no citizenship, no identity nor rights thereto, but if the Chickasaws violate the constitution and laws of the United States, and their own constitution, that Roff must willingly acquiesce and rejoice at the opportunity. In other words the Chickasaw legislature having committed a wrongful and void act, and the Chickasaw courts, from ignorance, self interest or otherwise, having cheerfully concurred and refused to reverse it, there being no power to mandamus the court, or right of appeal, Roff must be robbed of his VESTED RIGHTS, must lose his citizenship and forfeit all his property, all because of the so-called SACRED treaties with the Chickasaws, and to protect THE POOR INDIAN who always SEEKS but is not willing to DO equity. Now should this rule prevail, what would be the result?

By recent amendments of their constitution [1888] the blooded Chickasaws took away from the Chickasaw citizen by intermarriage the right of suffrage, and this they did because Sec. 38 of the treaty of 1868 permitted them to thus aggrieve or insult the pride and dignity of the "squaw man," said treaty not having provided against such wrongful act. Give them the power to violote their treaties, local constitution and laws and constitution of the United States by destroying the vested rights of the intermarried citizens [or "squaw men" as commonly called] and can we say that they would not willingly exercise it, as they have attempted to do in Roff's case. The aboriginal Indian, by invitation, sanction and approval having peopled their barren and their unproductive country by an energetic, prosperous and progressive white people, who not only have given their lives and energies to the upbuilding and maintenance of the government, the enriching of her soil, the increase of her resources and the promotion of her people socially, but who have so inseparably identified themselves with the blooded Indians by INTERMARRIAGE that they can scarcely tell their children apart, would now drive these people hence, and make them say to their promising BLOODED progeny, go my son and work for the good of your country, you have a country, you have inalienable and vested rights, but the "old man," the author of your being, has none. Make them say to their posterity " the government in which I lived and acquired vested rights and accumulated much valuable property, as a citizen of such, by one death blow, by one void act of its legislature, has made me a pauper, and I am powerless to resist such unlawful treatment." If Roff, being an American citizen, should go into any